IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1692 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 to 5 No

UTTAMCHAND KASHIPRASAD SHAH

Versus

VASUMATIBEN MAGANLAL MANANI

Appearance:

MR TV SHAH for Petitioner

MR PK JANI for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 23/07/1999

C.A.V. JUDGEMENT

1. Present respondent No.1 Smt. Vasumatiben Maganlal Manani filed a suit against present petitioner Uttamchand Kashiprasad Shah defendant No.1 and Kishanchand Chandansingh Rao - present Respondent No.2 in this Revision Application.

2. The plaintiff i.e. present respondent No.1 filed a H.R.P Suit being Suit No. 2866 of 1976 against the present applicant and respondent No.2. The plaintiff alleged that she was the owner of the premises situated in City of Ahmedabad at Naranpura in Pathik Society in Bungalow No. 6, bearing MC No. 145-6-1 and Final Plot No.11-11-A-6-1. Defendant No.1 Uttamchand Kashiprasad Shah present petitioner was the tenant in the suit premises and monthly rent was Rs.100/- exclusive of municipal taxes. The premises were let for commercial purpose and that is for the grocery business. It was alleged that the suit shop was not used for the grocery purpose since last one year from the date of the filing of the suit and the suit premises were kept closed by the tenant, though the possession of the suit premises was claimed on the ground of bona fide and reasonable requirement of the plaintiff. Thereafter, the plaint of the suit was amended and one more ground of sub-tenancy was added by the plaintiff and it was alleged that the present respondent No.2 i.e. defendant No.2 Kishanchand Chandrasingh Rao was the sub-tenant in the premises and he was doing business of milk in the suit premises and hence the defendant No.1 has illegally sublet or transferred the suit premises for consideration to defendant No.2 Kishanchand Chandrasingh Rao. Thus, the suit was defended by both the defendants. It was denied that the suit shop was not used by the defendant No.1; that the tenant was in arrears of rent and the defendant had not sublet the premises to defendant No.1. Defendant No.2 Kishanchand Chandrasingh Rao also by filing written statement, denied the factum of sub-tenancy specifically. The Trial Judge came to the conclusion that the decree of eviction was required to be passed on the ground of non-user of the premises for the continuous period of six months prior to the date of the filing of the suit. Regarding the ground of sub-tenancy, the Trial Court came to the conclusion that though transfer of possession is proved, but, the part of consideration between defendants No.1 and 2 has not been proved and, therefore, this ground was negatived by the Trial Court. Trial Court negatived all other grounds also, however, the suit came to be decreed on the ground of non-user of the suit premises. Against which, defendant No.1 filed an Appeal being Civil Appeal No. 36 of 1996 before the Appellate Bench of the Small Causes Court at Ahmedabad, in which, the present respondents No.1 and 2 were the respondents respectively. In the above mentioned Appeal, defendant

No.1 had also filed cross objections stating that the trial court erred in holding that the landlady was entitled to claim decree for eviction on the ground of non-payment of rent and that the trial court erred in not passing the decree on the ground of subletting also. The Appellate Bench of the Small Causes Court came to the conclusion that the decree of eviction on the ground of arrears of rent was not required to be passed and trial court has not erred in that respect. The Appellate Bench of the Small Causes Court also came to the conclusion that the trial judge has rightly passed decree for the non-user of the premises but the trial court erred in not passing the decree, on the ground of sub-tenancy and, therefore, the Appellate Bench of the Small Causes Court confirmed the decree which was passed by the trial court

on the ground of non-user of the premises, and concluded that the eviction decree was also required to be passed on the ground of sub-tenancy, which is proved.

3. Now therefore, being aggrieved, the original defendant No.1 Uttamchand Kashiprasad Shah has filed this Revision. Though in this Revision, two points have surfaced for the determination and those are as under :

(i) Whether the Trial Court and the Appellate Bench of the Small Causes Court have erred in law in passing the eviction decree on the ground of non-user of the premises, and

(ii) Whether the Appellate Bench of the Small Causes Court has erred in law in passing the eviction decree on the ground of sub-tenancy.

4. Learned Advocate Mr. T.V. Shah on behalf of the petitioner and learned Advocate Mr. P.K. Jani on behalf of the respondent No.1 were heard. Learned counsels have agreed to hear this Revision finally at this stage.

5. At the outset, the argument advanced by Mr. P.K. Jani for respondent No.1 is required to be evaluated on placing reliance on the decision of the Supreme Court in the matter of PATEL VALMIK HIMATLAL v. PATEL MOHANLAL MULJIBHAI (DEAD) THROUGH LRs, reported in 1999(1) GLR 15. Mr. Jani has argued that the powers under Sec. 29(2) of

the High Court are revisional powers and it empowers the High Court to correct the errors, which may make a

decision contrary to law and which errors go to the root of the decision but the Sec. 29(2) does not vest the High Court with the power to re-hear the matter and to re-appreciate the evidence. The mere fact that a different view is possible on re-appreciation of evidence, cannot be a ground for exercise of revisional jurisdiction. Mr. Jani has also relied on a decision of this Court in the matter of LEGAL REPRESENTATIVES AND HEIRS OF KARSANDAS GORDHANDAS PARMAR vs. BAHADURSINGH MADHURSINGH DODIA, reported in 1999 (1) GLH 543, wherein also the above mentioned principle has laid down by the Supreme Court is reiterated.

6. The principle laid down by the Supreme Court is a celebrated principle and that cannot be a dispute relating this matter. This Revision will be examined only within the scope of revisional powers of this Court as laid down by the Supreme Court in the above mentioned decisions.

7. Now, examining whether both the courts below have committed error of law, which goes to the root of the case. The evidence on record and the approach of the courts below towards the evidence, on which the conclusions are based, will be required to be seen.

8. We shall first examine the ground of non-user of the premises i.e. Section 13(1)(k) of the Bombay Rent Act. The section provides that when the premises have

not been used without reasonable cause by the tenant for the purpose for which they were let for the continuous period of six months immediately preceding the date of the suit, eviction decree can be passed against the tenant. Upholding the conclusion of the trial court on this ground, the Appellate Bench of the Small Causes Court has taken into consideration the following facts:

(i) The oral evidence of Power of Attorney Holder of Plaintiff.

(ii) Photographs at Exhibit 301 to 304 alleged to have been taken on 4th January, 1977.

(iii) The defendant No.1 has another shop in the name and style of " Mahavir Provision Store" else where i.e. near Sardar Patel Colony.

(iv) The electric bills for the use of electricity within six months prior to the date of the filing of suit which shows minimum charges for the use

of electricity.

(v) The photographs taken of the suit premises on 3rd January, 1981.

(vi) The notes prepared by the Court Commissioner on 23rd July, 1988, which is at Exh. 207 and the Commissioner is examined at Exhibit 344.

9. The First Appellate Court came to the conclusion that on 23rd July, 1977 when the Commissioner of the Court visited the suit shop, the premises found closed. The Commissioner also visited the other shop of defendant No.1, i.e. in the name and style of "Mahavir Provision Stores", where he was found doing business there and, therefore, the explanation given by the defendant No.1 that on that day one of his relatives was died and the shop was closed cannot be taken into consideration. The trial court took into consideration the photographs taken on 4th January, 1977, which are at Exhibit 301 to 304, in which the suit shop was found closed. In this regard, the evidence of the photographer is also there on the record at Exhibit 300. The First Appellate court also took into consideration the electricity bills produced for showing the consumption of the electricity which were found minimum during six months prior to the filing of the present suit. From all these evidences, the First Appellate Court come to the conclusion that the suit shop was closed without reasonable cause by the defendant No.1 six, months prior to the date of filing of the suit. It was further observed by the First Appellate Court that the defendant No.1 has not given any proper explanation for these circumstances against him. First Appellate Court also took into consideration the Accounts Books of the defendant No.1, but, this evidence was discarded by the Trial Court as well as by the Appellate Bench of the Small Causes Court observed that these books were not believable and therefore no weightage can be attached to these books of accounts.

10. It clearly appears that the trial court as well as the Appellate Bench of the Small Causes Court have lost sight of the mandate of Section 13(1)(k) of the Bombay Rent Act. The mandate of the section is when the premises are found closed for no reasonable cause continuously for a period of six months prior to the date of the filing of the suit, the eviction decree can be passed. It appears that the Trial Court as well as the

Appellate Bench of the Small Causes Court have taken the pieces of the fact, which are segregated and placed them in the juxtaposition, and from that the Appellate Bench inferred and presumed that the suit shop was closed for continuous period of six months prior to the filing of the suit; and this is the error of law apparent on the face of the record, and it goes to the root of the cause. It is a celebrated principle of law that the word "continuous" applied in Section 13(1)(k) of the Bombay Rent Act clearly denotes that the premises must not have been opened for a day even, and what is found from the evidence is that the day on which the Commissioner visited the suit shop was found closed. The photographs taken by the photographer on a stray day shows that the suit shop was found closed and the oral evidence of the plaintiff was believed. These are not the evidence to raise to a presumption that the suit shop was continuously kept closed for no reason. Normally, no weightage can be given to the panchnama, but even if, weightage is given, then it is only found on that particular day, the suit shop was closed. But from this fact, it cannot be presumed that the shop was not used continuously for a period of six months. Only two

incidents of suit shop being closed are placed on the evidence and that is the evidence of photographer and the notes of the Commissioner. This evidence itself is not an evidence at all to come to a conclusion or to draw an inference that the suit premises was closed continuously for a period of six months though the Appellate Bench and the Trial Court also have considered the electric bills for the consumption of the electricity during these six months. Undoubtedly, these bills show no consumption of electricity. Defendant No.1 has offered his explanation for this that he being a Jain, before the sun set, he closes his shop. The defendant No.1 has also produced electric bills of six months prior to the six months prior to the date of the filing of the suit. These bills have not been considered by any of the courts below properly. In those six months bills, which the defendant No.1 has produced, the charges of the electricity are minimum and there is no consumption. On the contrary, from this explanation of the defendant No.1 that he is not using the electricity, ought to have been accepted by the trial court as well as the Appellate Bench of the Small Causes Court. Therefore, sofar as these bills are concerned, this is not an useful evidence for the plaintiff as made useful by the courts below. Then, the only piece of evidence remains and that is the photographs and panchnama. If the photographs and panchnama are taken together along with the oral evidence

of the plaintiff, then even the proof and a factum of non-user of premises continuously for six months is a distant matter but even no presumption or inference can

be drawn that the premises were closed continuously for six months. No prudent man can arrive at this conclusion from this stray days evidence of closing or non-using the premises. The explanation offered by the defendant No.1, however, has not been accepted by the courts below, labelling them not to be trustworthy, but at the same time, both the courts below ought to have taken a notice of fact that any scheming plaintiff may take photographs or may try to get a panchnama to be made on any stray day on which day he knew that the premises is closed and, in fact, there is no evidence at all even to infer that the suit premises was not used continuously for six months prior to the date of the filing of the suit, let alone proving by cogent evidence in terms of Sec. 13(1)(k) of the Bombay Rent Act that the premises were closed continuously for the period of six months and, therefore, the findings are not according to law as has been enacted in Sec. 13(1)(k) of the Bombay Rent Act and this error is an error going to the root of the matter. Not only that but in reasoning, both the courts below have misread the evidence and relying on inferences only, a conclusion has been arrived at, which conclusion is required to be set aside. Hence, the finding that the plaintiff proved that the premises were closed or are not used without any cause continuously for six months prior to the date of filing of the suit, is set aside and both the courts below have materially erred in law in arriving at the above said conclusion.

11. Sofar as the ground of sub-tenancy is concerned, though the trial court came to the conclusion that the transfer of possession from defendant No.1 to defendant No.2 is proved, but since the factum of consideration is not proved, the eviction decree is not passed by the trial court. On this ground, the Appellate Bench of the Small Causes Court went a step ahead and inferred the factum of the consideration also and passed the eviction decree on that ground. Now, scrutinising the record carefully, it is clear that again the courts below placed reliance on a panchnama prepared in another suit by the Court Commissioner, which is at Exhibit 207, which is a panchnama or the notes of the Commissioner prepared on 27th September, 1987 in H.R.P. Suit No. 3291 of 1981

filed by the present plaintiff against the defendants. This panchnama discloses that some milk cans were found in the suit premises. In some of the cans "Chandrika Dudh Ghar" lebel also found. Some boxes of sweets were also found. No grocery articles were found in the suit premises. The First Appellate Court has observed that it is an admitted fact that defendant No.2 is doing the business in the adjoining shop in the name and style of "Chandrika Dudh Ghar" and since these articles are found in the suit premises, the trial court as well as the First Appellate court presumed that the possession was transferred by defendant No.1 to defendant No.2. Further, in Exh. 207, the Commissioner has noted that while the panchnama was being prepared, some persons from the adjoining shops came and attacked on the power of attorney holder of the plaintiff and the commissioner and

the work of preparing the panchnama was required to be dropped. From this fact, again, the trial court and the First Appellate court raised a presumption that the persons who caused disturbances in the working of preparing panchnama and since they came from the adjoining shops, they must be the persons of defendant No.2 and since they disturbed the work of preparing the panchnama, the possession must be with the defendant No.2 and, therefore, on the ground of sub-tenancy, it was first presumed by the trial court as well as by the Appellate Court that the possession of the suit premises was illegally transferred by defendant No.1 to defendant No.2 and thereafter the First Appellate Court after relying on decision of the Supreme Court in the case of M/S BHARAT SALES LIMITED vs. LIFE INSURANCE CORPORATION OF INDIA, reported in AIR 1998 SC 1240, inferred the factum of consideration and on the ground of sub-tenancy, the eviction decree was passed by the trial court.

12. The trial court in arriving at a conclusion of possession having been transferred by defendant No.1 to defendant No.2 and First Appellate Court, confirming the above mentioned conclusion of the trial court and going further ahead by raising presumption of consideration, has committed a grave error of law. The principles regarding this law have been lost sight of and, therefore, this conclusion is also not according to law. What is required to be proved in case of allegation of sub-tenancy is firstly the exclusive possession of

sub-tenancy. Now, what is the exclusive possession?

Neither the trial court nor the Appellate Bench of the Small Causes Court attended or tried to make out that what "exclusive possession" means in law and that whether defendant No.2 was in such exclusive possession. Exclusive possession means right to include as also right to exclude others. Real physical possession to the inclusion and the exclusion of others by the person other than the tenant can only constitute coupled with the consideration, a sub-tenancy. On scrutinising the record, it is clearly found that reliance has been placed on the testimony of the plaintiff's power of attorney holder and panchnama prepared by the court commissioner. What is found by the Court Commissioner is only some milk cans in the suit premises. Some of the milk cans carried the name of defendant No.2 and also some sweet boxes. From this mere fact, a very serious presumption of the exclusive possession of defendant No.2 has been drawn by both the courts below. The finding of the exclusive possession must be based on evidence and that factum of possession must be proved. From this only, no prudent man can infer the presence of a third party. Proper explanation for this also has been offered by defendant No.1, but, he failed to convince both the courts below. When the primary aspect of proof to exclusive possession is missing, the question of raising the secondary aspect of consideration does not arise. Even the presence of a

third party would not lead to a presumption of exclusive possession. Let alone finding of some articles not pertaining to the business of defendant No.1 and there is no other evidence on the record to even denote the presence of a third party on the premises except the above mentioned milk cans. The presumption of both the courts below drawn from the milk cans and sweet boxes and from oral Evidence of plaintiff, to prove the factum of exclusive and physical possession, in fact, was misreading of Evidence to the extent to come to a conclusion of sub-tenancy and even the presence of a third party on the suit premises and, therefore, both the courts below have materially erred in law and the finding of sub-tenancy of both the courts below is not according to law because the law requires that in case of sub-tenancy, the factum of exclusive and physical possession must be proved and mere presence of a third party even would not lead to any presumption of transfer of possession. Therefore, the findings of the courts below are not according to this principle of law and this

is the error in law going to the root of the matter.

13. In this view of the matter, the findings of the trial court regarding transfer of the possession and the finding of the Appellate Bench of the Small Causes Court to support the view of the trial court and going ahead by raising a presumption of consideration is required to be set aside and it is required to be held that the plaintiff is not able to prove either exclusive possession of the defendant No.2 or transfer of possession by defendant No.1 or the passing of consideration between the defendants. Therefore, the findings of the courts below regarding the sub-tenancy is quashed and set aside.

14. In this view of the matter, this Revision Application is to be allowed. Eviction decree passed by the trial court on the ground of non-user as confirmed by the Appellate Bench and the eviction decree passed by the Appellate Bench of the Small Causes Court on the ground of sub-tenancy are set aside. The suit of the plaintiff stands dismissed. However, findings of trial court deciding standard rent are not disturbed. Decree be drawn accordingly. No order as to costs.

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p.n.nair